

Brief Facts of the case:

M/s. Swastik Coal Corporation Pvt. Ltd., J.J. Motal, Near Meera Guest House, Moti Khawdi, Khanwaliya Highway, Sikka, District: Jamnagar-361140 having IEC Code Number – 1104007126 (hereinafter referred to as the 'said noticee') is importing Coal from South Africa. The said noticee had classified the coal imported by them under CTH 27011920 claiming the same as 'Steam coal' and paid only 1% Additional duty leviable under Sub-Section (1) of Section 3 of the Customs Tariff Act 1975(CVD) claiming the exemption Notification 12/2012-Cus. dated 17.03.2012 (Sr. No. 123). Intelligence collated and developed by the officers of DRI, Ahmedabad indicated that certain importers were importing Coal having the calorific value greater than 5,833 KCal/Kg and the coal imported by them fell in the category of Bituminous coal chargeable to duty @ 5% Basic Customs Duty (BCD) under the notification no: 12/2012-Cus. dated 17.03.2012 (Sr. No. 124) and 6% Additional duty leviable under Sub-Section (1) of Section 3 of the Customs Tariff Act 1975 (CVD) as in terms of the Central Excise Tariff.

2.1 The Coal is classified under Chapter 27 of the First Schedule to the Customs Tariff Act 1975. The relevant text of the same is re-produced hereunder:

2701 COAL; BRIQUETTES, OVOIDS AND SIMILAR SOLID FUELS MANUFACTURED FROM COAL.
- Coal, whether or not pulverised, but not agglomerated:
 2701 11 00 - - Anthracite
 2701 12 00 - - Bituminous coal
 2701 19 - - Other coal:
 2701 19 10 - - - Coking Coal
 2701 19 20 - - - Steam Coal
 2701 19 90 - - - Other
 2701 20 - Briquettes, ovoids and similar solid fuels manufactured from coal:

3. Further, sub-heading note (2) of the Chapter 27 specifically provides that for the purposes of sub-heading 2701 12 "bituminous coal" means coal having volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg.

4.1. From the scrutiny of the import documents submitted by the said noticee, it transpired that they have imported "Steam (Non Coking) Coal of South African Origin" having Calorific value of 6552 Kcal/Kg (ADB basis) from South Africa at Kandla Port. The same is detailed below:-

S. No.	Vessel Name	B/E	Date	GCV (ADB) Kcal/Kg	VM (ADB)
1	GENCO BRITTANY	6483956	09.04.2012	6552	24.8

4.2 It transpired from the import documents that the said noticee had classified the coal imported by them under Customs Tariff Item 27011920 as Steam Coal and availed the exemption of Customs Duty under exemption Notification No. 12/2012-Cus dated 17.03.2012 (Sr. No. 123) in their imports after 17.03.2012.

4.3 Further, it also transpired from the import documents that the said noticee was importing Coal at Kandla Port and during the scrutiny of documents it was also observed that the Coal imported vide the aforesaid Bill of Entry was assessed finally on account of RMS facilitation at Kandla Port.

5.1 The analysis report of the shipment of coal in respect of the said noticee indicated that the Gross Calorific Value of the Coal imported was 6552 Kcal/Kg (ADB basis) and the Volatile matter exceeds 14% (ADB) the details are tabulated in Annexure-B annexed to the Show Cause Notice. The relevant legal provisions in so far as they relate to the facts and circumstances of the subject imports are as follows (emphasis supplied):-

6.1 **The Customs Act, 1962**

(i) **Section 2(39) – "Smuggling"** in relation to any goods, means any act or omission which render such goods liable to confiscation under Section 111 or Section 113 of the Customs Act, 1962.

(ii) **Section 12. (1) Dutiable goods.** - Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975)], or any other law for

the time being in force, on goods imported into, or exported from India.

(iii) Section 15 (1). Date for determination of rate of duty and tariff valuation of imported goods. *The rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force, -*

(a) in the case of goods entered for home consumption under section 46, on the date on which a bill of entry in respect of such goods is presented under that section;

*(b) in the case of goods cleared from a warehouse under section 68, on the date on which a **bill of entry for home consumption in respect of such goods is presented under that section;***

(c) in the case of any other goods, on the date of payment of duty:

(iv) Section 28 – Recovery of duties not levied or short-levied or erroneously refunded–

(1) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,

(a) the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been short levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of, -

(i) his own ascertainment of the duty; or

(ii) the duty ascertained by the proper officer,

the amount of duty along with the interest payable thereon under Section 28AA or the amount of interest which has not been so paid or part-paid.

(v) Section 28AA: Interest on delayed payment of duty:

(1) Notwithstanding anything contained in any judgment, decree, order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.

(2) Interest at such rate not below ten per cent. and not exceeding thirty-six per cent. per annum, as the Central Government may, by notification in the Official Gazette, fix, shall be paid by the person liable to pay duty in terms of section 28 and such interest shall be calculated from the first day of the month succeeding the month in which the duty ought to have been paid or from the

date of such erroneous refund, as the case may be, up to the date of payment of such duty.

- (3) Notwithstanding anything contained in sub-section (1), no interest shall be payable where,—
- (a) the duty becomes payable consequent to the issue of an order, instruction or direction by the Board under section 151A; and
- (b) such amount of duty is voluntarily paid in full, within forty-five days from the date of issue of such order, instruction or direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment.”.

- (vi) **Section 46: Entry of goods on importation.** - (1) The importer of any goods, other than goods intended for transit or transshipment, shall make entry thereof by presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed form:

Provided that if the importer makes and subscribes to a declaration before the proper officer, to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information, permit him, previous to the entry thereof (a) to examine the goods in the presence of an officer of customs, or (b) to deposit the goods in a public warehouse appointed under section 57 without warehousing the same.

.....
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.....”

(4) The importer while presenting a bill of entry shall at the foot thereof make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods.

- (vii) **Section 111 –Confiscation of improperly imported goods, etc.** - The following goods brought from a place outside India shall be liable to confiscation :

.....
.....

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force.

- **any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54;**

.....”

(viii) Section 112- Penalty for improper importation of goods, etc. – Any person **-(a)** - who in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111, shall be liable to penalty.

.....

(ix) Section 114A – Penalty for short levy or non levy of duty in certain cases -: -where duty has not been levied short levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful misstatement or suppression of facts, the person who is liable to pay duty or interest as the case may be as determined under sub-section (8) of Section 28 shall also be liable to pay a penalty equal to the duty or interest so determined.

6.2 **Exemption and Effective Rate of Basic and Additional Duty for specified goods of Chs. 1 to 99 [Notification 12/2012-Cus. Dated 17.03.2012]:**

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

Notification
No.12 /2012 –Customs

New Delhi, dated the 17 th March, 2012

G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 21/2002-Customs, dated the 1st March, 2002 Published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 118(E) dated the 1st March, 2002, except as respects things done or omitted to be done before such supersession, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description specified in column (3) of the Table below or column (3) of the said Table read with the relevant List appended hereto, as the case may be, and falling within the Chapter, heading, sub-heading or tariff item of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India,-

(a) from so much of the duty of customs leviable thereon under the said First Schedule as is in excess of the amount calculated at the standard rate specified in the corresponding entry in column (4) of the said Table;

(b) from so much of the additional duty leviable thereon under sub-section (1) of section 3 of the said Customs Tariff Act 1975 (51 of 1975) as is in excess of the additional duty rate specified in the corresponding entry in column (5) of the said Table, subject to any of the conditions, specified in the Annexure to this notification, the condition number of which is mentioned in the corresponding entry in column (6) of said table:

(The relevant portion of the said Notification is reproduced here below)

S. No.	Chapter or Heading or Sub-heading or tariff item	Description of goods	Standard rate	Additional duty rate	Condition No.
(1)	(2)	(3)	(4)	(5)	(6)
122	2701	Coking coal Explanation - For the purpose of this exemption, "Coking coal" means coal having mean reflectance of more than 0.60 and Swelling Index or Crucible Swelling Number of 1 and above	NIL	-	-
123	27011920	Steam Coal	NIL	1%	-
124	2701 11 00, 2701 12 00, 2701 19	All goods other than those specified at S. Nos. 122 and 123 above	5%	-	-

6.3 Chapter Sub-Heading Note 2 to the Chapter 27 as given under:

CHAPTER 27

Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes

SUB-HEADING Notes :

2. For the purposes of sub-heading 2701 12 "bituminous coal" means coal having volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value

limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg.

6.4 **The Foreign Trade (Development and Regulation) Act, 1992**

(i) **Section 3(2)** –The Central Government may also, by order published in the Official Gazette, make provision for prohibiting, restricting, or otherwise regulating, in all cases and subject to such exceptions, if any, as may be made by or under the order, the import or export of goods.

(ii) **Section 3(3)** - all goods to which any order under sub section (2) applies shall be deemed to be goods the imports or exports of which has been prohibited under section 11 of the Customs Act, 1962 and all the provisions of that Act shall have effect accordingly.

(iii) **Section 11: Contravention of provision of this Act, rules, orders and exports and import policy:** - No export or import shall be made by any person except in accordance with the provisions of this Act, the rules and orders made there under and the export and import policy for the time being in force.

6.5 **FOREIGN TRADE (REGULATION) RULES, 1993**

Rule: 11. Declaration as to value and quality of imported goods-

On the importation into, or exportation out of, any customs ports of any goods, whether liable to duty or not, the owner of such goods shall in the Bill of Entry or the Shipping Bill or any other documents prescribed under the Customs Act 1962, state the value, quality and description of such goods to the best of his knowledge and belief and in case of exportation of goods, certify that the quality and specification of the goods as stated in those documents, are in accordance with the terms of the export contract entered into with the buyer or consignee in pursuance of which the goods are being exported and shall subscribe a declaration of the truth of such statement at the foot of such Bill of Entry or Shipping Bill or any other documents.

7.1 Scrutiny of the documents/records of the said noticee indicated that they had imported coal having Volatile Matter higher than 14% and Gross Calorific Value greater than 5833 Kcal/Kg. The said noticee was classifying the coal imported by them under Customs Tariff Item 27011920 and availing the exemption of Customs Duty under Sr. No: 123 of the Notification No. 12/2012-Cus dated 17.03.2012 for their imports with effect from 17.03.2012. As the revenue implication on

account of mis-classification arose only in the wake of Notification No. 12/2012-Cus dated 17.03.2012, the evidence discussed in the instant notice covers the period commencing from 17.03.2012.

7.2 The Sub-heading note (2) of the Chapter 27 of the First Schedule to the Customs Tariff Act 1975, defines "bituminous coal" as coal having volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg.

7.3 Further, as per the literature 'Coal Production and Preparation Report' downloaded from the website <https://www.eia.gov/cneaf/coal/page/surveys/eia7ainst.pdf>, it is clear that dry, mineral-matter free basis means total moisture and mineral matter have been removed and moist, mineral-matter free basis means the natural inherent moisture is present but mineral matter has been removed and moist coal does not include visible water on the surface and the Volatile Matter (on dry, mineral-matter-free basis) & Gross Calorific Value(on moist, mineral-matter-free basis) can be derived by applying the following Formulae:-

$$\text{Dry, mineral-matter free fixed carbon percentage} \\ = 100 (FC - 0.15S) / (100 - (M + 1.08A + 0.55S))$$

$$\text{Dry, mineral-matter free volatile matter percentage} \\ = 100 - (\text{Dry, mineral-matter free FC})$$

$$\text{Moist, mineral-matter free Btu content} \\ = 100 (Btu - 50S) / (100 - (1.08A + 0.55S))$$

Where,

Btu = gross calorific value per pound;

FC = fixed carbon content percentage by weight;

M = moisture content percentage by weight;

A = ash content percentage by weight; and

S = sulfur content percentage by weight.

*Btu = 1.80 * kcal/kg*

7.3.1 The values of Ash content, Sulphur content and Btu are to be applied on Air Dry Basis (ADB) as confirmed by Joint Director, Customs and central Revenue Control Laboratory (CRCL) vide letter F. No: JNCH/T.O./2012-12 dated 07.03.2013.

7.3.2 The values of fixed carbon content and ash content used in above formulae have not been adjusted for SO₃ free basis (as prescribed by ASTM 388). In this regard reliance was placed on the

conclusion put forth in the report titled 'SULFUR RETENTION IN BITUMINOUS COAL ASH' by O.W. Rees et al. In the said report it has been concluded that 'very little sulfur is retained in bituminous coal ash resulting from higher temperature combustion in industrial or power plant installations'. Apart from above, in the body of the above report, it is noted that the the amount of sulfur retention in coal ash is a function (effect) of ashing temperature. As the ashing temperature rises the sulfur content in ash decreases. It reaches zero at higher temperatures (usually >1000 deg Celsius). It can also be concluded from the said report that even at the relatively lower temperatures (say 800 deg Celsius - which is usually laboratory ashing temperature) the percentage of sulfur content in ash is negligible (to the tune of 5% on an average). Thus the effect of non-adjustment (with reference to SO₃) of values of fixed carbon content and ash content in bituminous coal would be negligible on both volatile matter (on dry, mineral matter free basis) and calorific value limit (on moist, mineral matter free basis), and hence would hardly impinge adversely on the interest of the importers. In any case, the calorific values in respect of coal consignments covered in this show cause notice are not so very close to the figure of 5833 kcal/kg, nor their volatile matter content percentage so very close to 14%, and hence ignoring the negligible presence of SO₃ will be of no consequence as far as the classification of the impugned coal and duty liability thereon are concerned.

8. A reference was made by DRI, vide a letter F. No: DRI/AZU/INT-01/2013 dated 05.03.2013 to the Joint Director, Customs and central Revenue Control Laboratory (CRCL) to ascertain whether the aforesaid formulae can be applied as such in calculation of the volatile matter limit (on a dry, mineral-matter-free basis) and the calorific value limit (on a moist, mineral-matter-free basis) in case of Coal imported into India.

9. The Joint Director, Customs Laboratory, Jawaharlal Nehru Customs House, Nhava Sheva, Raigad, Maharashtra vide a letter F. No: JNCH/T.O./2012-12 dated 07.03.2013 confirmed the applicability of the said formulae to the coal imported. It was also confirmed that the values of Ash content, Sulphur content and Btu are to be applied on Air Dry Basis (ADB).

10. The said noticee had imported Coal from South Africa vide the aforesaid Bill of Entry at Kandla Port describing them as "Steam (Non Coking) Coal of South African Origin". The Certificate of Sampling & Analysis of Shipment of Coal for aforesaid vessel submitted by the said noticee indicated that the Coal imported were having Gross Calorific Value more than 5833 kcal/kg simultaneously, the Volatile Matter is more than 14%. But, the Gross Calorific Value and the Volatile Matter in these analysis reports are on Air Dry Basis (ADB) conditions, whereas as per Sub-heading Note 2 to Chapter 27 of the Customs Tariff the volatile matter limit should be on a dry, mineral-matter-free basis and a calorific value limit should be on a moist, mineral-matter-free basis. The formulae to calculate the Volatile Matter (on dry, mineral-matter-free basis) & Gross Calorific Value (on moist, mineral-matter-free basis) is given below:

$$\text{'Dry, mineral-matter-free fixed carbon percentage'} = \frac{100 (FC - 0.15S)}{100 - (M + 1.08A + 0.55S)}$$

$$\text{'Dry, mineral-matter-free volatile matter percentage'} = 100 - (\text{Dry, mineral-matter-free FC})$$

$$\text{'Moist, mineral-matter-free Btu content'} = \frac{100 (Btu - 50S)}{100 - (1.08A + 0.55S)}$$

Btu=Gross calorific value per pound.
S= Sulphur content percent by weight
A= Ash content percent by weight.
(1 Kcal/Kg = 1.800001 Btu/Lb.)

On the basis of above said formula the Volatile Matter (VM) (on dry, mineral-matter-free basis) & Gross Calorific Value (GCV) (on moist, mineral-matter-free basis) are calculated (Annexure-B).

11. The classification of the goods under Customs Tariff is governed by principles as set out in 'The General Rules for the Interpretation of Import Tariff'. Rule 1 of The General Rules for the Interpretation of Import Tariff clearly stipulates that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes. Further, the Rule 6 of The General Rules for the Interpretation of Import Tariff states that 'for legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub-headings and any related sub-heading Notes and, mutatis mutandis, to the above rules, on the understanding that only sub-headings at the same level

are comparable. For the purposes of this rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.'

12. The Sub-heading note (2) of the Chapter 27 specifically provides that for the purposes of sub-heading 2701 12, "bituminous coal" means coal having volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg. The coal imported by M/s SCCPL had volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and the calorific value limits (on a moist, mineral-matter-free basis) greater than 5833 kcal/kg. Hence the said coal is classifiable under Customs tariff heading 2701 1200 instead of CTH 2701 1920 as Steam Coal.

13.1 The structure of chapter heading no: 2701 is reproduced below once again for convenience.

2701	COAL; BRIQUETTES, OVOIDS AND SIMILAR SOLID FUELS MANUFACTURED FROM COAL.
	<i>- Coal, whether or not pulverised, but not agglomerated:</i>
2701 11 00	<i>-- Anthracite</i>
2701 12 00	<i>-- Bituminous coal</i>
2701 19	<i>-- Other coal:</i>
2701 19 10	<i>--- Coking Coal</i>
2701 19 20	<i>--- Steam Coal</i>
2701 1990	<i>--- Other</i>
2701 20	<i>- Briquettes, ovoids and similar solid fuels manufactured from coal:</i>

13.2 As is evident from the above structure, only that coal which does not get covered under the category of anthracite coal of Customs tariff heading (CTH) 27011100 and Bituminous Coal of CTH 27011200 can go in the category of 'Other Coal' of CTH 2701.19. The 'Other Coal' of CTH 2701.19 is then divided into Coking Coal CTH 2701 19 10, Steam Coal CTH 2701 19 20 and other CTH 2701 1990. It has been abundantly brought out without any doubt that the impugned coal categorically and unambiguously satisfies the requirements stipulated for its classification under CTH 27011200 as 'Bituminous Coal' and therefore it gets classified there (i.e. under CTH 27011200) and as a consequence it cannot be covered under the category of 'Other Coal' of CTH 2701 19 and therefore its classification under CTH 27011920 is completely out of question because coal which is not covered under 2701 19 cannot be covered under 27010920.

14.1 The Notification No: 12/2012-cus dated 17.03.2012 exempts the specified goods when imported into India;

- (a) from so much of the duty of customs leviable thereon under the said First Schedule as is in excess of the amount calculated at the standard rate specified in the corresponding;
- (b) from so much of the additional duty leviable thereon under sub-section (1) of section 3 of the said Customs Tariff Act 1975 (51 of 1975) as is in excess of the additional duty rate specified in the corresponding entry subject to any of the conditions, specified:

The relevant portion of the table appended to the notification reads as under:

S. No.	Chapter or Heading or sub-heading or tariff item	Description of goods	Standard rate	Additional duty rate	Condition No.
(1)	(2)	(3)	(4)	(5)	(6)
123	27011920	Steam Coal	Nil	1%	-
124	2701 11 00, 2701 12 00, 2701 19	All goods other than those specified at S. Nos. 122 and 123 above.	5%	-	-

14.2 Since the impugned coal imported by M/s SCCPL appears to be classifiable under CTH 2701 12 00, the same is not eligible for exemption in terms of Sr. No: 123 of the said notification and hence is leviable to duty @ 5% Basic Customs Duty in accordance with the Sr. No: 124 of the Notification no: 12/2012 dated 17.03.2012 and 6% Additional duty (CVD) leviable thereon under sub-section (1) of section 3 of the said Customs Tariff Act 1975.

15.1 In terms of Section 46 (4) of Customs Act, 1962, the importer is required to make a declaration as to truth of the contents of the Bill of entry submitted for assessment of Customs duty. The said noticee had wrongly declared the coal imported by them as 'Steam Coal', in as much as they were fully aware that the said Coal ordered by them were having Gross Calorific Value in excess of 5833 Kcal/Kg and the percentage of Volatile matter in excess of 14%. Further, the Certificate of Sampling & Analysis received from the overseas supplier categorically mentioned that the said Coal imported was having Gross Calorific Value in excess of 5833 Kcal/Kg and the percentage of Volatile matter in excess of 14%. The said noticee was aware that the sub-heading note (2) to the Chapter 27 of the Customs Tariff categorically

mentioned that for the purposes of sub-heading 2701 12 "bituminous coal" means coal having volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5833 Kcal/kg. Despite of the same they chose to declare their goods as "steam coal" classifiable under CTH 27011920 to wrongly claim the benefit of exemption applicable to the 'Steam Coal' under Notification No. 12/2012-Cus dated 17.03.2012 (Sr.No.:123).

15.2 Thus it appeared that the said noticee had contravened the provisions of sub section (4) of Section 46 of the Customs Act, 1962, in as much as, they had mis-declared the goods imported as 'Steam (Non Coking) Coal of South African Origin' in the declaration form of Bill of Entry filed under the provisions of Section 46(4) of the Customs Act 1962 and mis-classified the goods under Customs tariff heading 27011920, in order to avail the exemption available in the Notification 12/2012-Cus. dated 17.03.2012 against the Sr. No. 123. This constitutes an offence of the nature covered in Section 111(m) of the Customs Act, 1962. Accordingly the impugned goods as detailed in the Annexure - A to the show cause notice are liable to confiscation under Section 111(m) of the Customs Act, 1962.

15.3 Further, in terms of Rule 11 of the Foreign Trade (Regulation) Rules, 1993, on the importation into, any customs ports of any goods, whether liable to duty or not, the owner of such goods shall in the Bill of Entry or the Shipping Bill or any other documents prescribed under the Customs Act 1962, state the value, quality and description of such goods to the best of his knowledge and belief and in case of exportation of goods, certify that the quality and specification of the goods as stated in those documents, are in accordance with the terms of the export contract entered into with the buyer or consignee in pursuance of which the goods are being exported and shall subscribe a declaration of the truth of such statement at the foot of such Bill of Entry or Shipping Bill or any other documents. In the instant case the said noticee had failed to declare the true description of the products imported as 'Bituminous Coal' and has hence contravened the provisions of Rule 11 of the Foreign Trade (Regulation) Rules, 1993 and Rule 14 of the Rules ibid in as much as the said noticee knew that the declarations made by them was false with regard to the description of the Coal imported by them. The contraventions of the provisions of the

Foreign Trade (Development and Regulation) Act, Foreign Trade (Regulation) Rules and Export and Import policy is a prohibition of the nature as described under the Section 11 of the Foreign Trade (Development and Regulation) Act, 1992. Now, in terms of Section 3(3) of the Act *ibid* the prohibitions are deemed to be a prohibition under the Section 11 of the Customs Act 1962. In terms of the Section 111 (d) of the Customs Act, 1962 any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force is liable to confiscation. Thus it appears that the impugned goods as detailed in the Annexure-A to the show cause notice are liable to confiscation under Section 111(d) of the Act *ibid*.

15.4. Further, on account of the above said acts of omission and commission, which have rendered the impugned goods liable to confiscation under the provisions of Section 111(d) and 111(m) of the Customs Act 1962, the said noticee are also liable for penalty under Section 112(a) of the Act *ibid*.

16. Further, it also appeared that the said noticee has mis-declared and mis-classified the impugned goods under CTH 2701 1920 (instead of their correct classification under CTH 2701 1200) in their Bill of Entry and thereby wrongly availed the benefit of the exemption Notification 12/2012-Cus dated 17.03.2012 (Sr. No. 123) and paid duty (only CVD) @ 1% ad valorem instead of paying BCD @ 5% in terms of Notification 12/2012-Cus dated 17.03.2012 (Sr. No. 124) and CVD @ 6% ad valorem leviable under sub-section (1) of Section 3 of the Customs Tariff Act, 1975, which led to short levy of Customs duty. Bill of Entry as detailed in Annexure-A to the show cause notice was assessed finally on account of RMS facilitation. Hence, differential duty of Rs. 83,07,210/- on the 10000 MTs of impugned coal, imported by the said noticee at Kandla Port under the Bill of entry as detailed in Annexure-A to the show cause notice which was assessed finally, is liable to be recovered from them under Section 28(1) of the Customs Act, 1962 along with applicable interest under Section 28 AA of the Customs Act, 1962.

17. In view of the above, the said noticee, M/s. Swastik Coal Corporation Pvt. Ltd., Sikka, was issued a Show Cause Notice bearing F.No.S/10-41/SWASTIK/GR.I/12-13 dated 29.03.2013, calling upon them to show cause to the Commissioner of Customs, Kachchh Commissionerate, Kandla as to why:-

- (i) Their claim for classification of impugned goods (as detailed in Annexure A) under Customs Tariff item / heading 270119 20, should not be rejected and why the same should not be re-classified under Customs Tariff item/heading 2701 1200 of the First Schedule to the Customs Tariff Act, 1975;
- (ii) The 10000 MTs, imported Coal valued at Rs.7,83,03,416/- as detailed in Annexure –A to the Show Cause Notice, should not be confiscated/held liable for confiscation under the provisions of Section 111(d) and 111(m) of the Customs Act,1962 ;
- (iii) The Differential Customs Duty amounting to Rs.83,07,210/-, on the 10000 MTs, of imported impugned Coal as detailed in Annexure-A to this notice, should not be demanded and recovered from them under Section 28(1) of the Customs Act, 1962;
- (iv) Interest should not be recovered from them on the said differential Customs Duty, as at (iii) above, under Section 28AA of the Customs Act, 1962, wherever the Bill of Entry are finally assessed;
- (v) Penalty should not be imposed on them under Section 112(a) of the Customs Act, 1962.

Defence Reply & Personal Hearing:

18.1 Personal Hearing in the said case was fixed on 21.02.2014 and the intimation regarding the same was sent vide letter dated 30.01.2014. However, the said noticee neither attended the said Personal Hearing nor had made any communication seeking adjournment. Accordingly, the second Personal Hearing was fixed on 29.04.2014 and the intimation was sent vide this office letter dated 04.04.2014, which also met with the same fate as that of the first hearing. However, in the interest of natural justice, another opportunity of Personal Hearing was afforded on 21.05.2014 and the intimation was

sent vide this office letter dated 01.01.2014. However, for this Personal Hearing also the said noticee neither attended the said Personal Hearing nor had made any communication seeking adjournment.

18.2 It is also worth mentioning that the said noticee also did not file their reply to the Show Cause Notice, in spite of the fact that they were periodically requested to file their written submissions. **However, despite the above, they have not bothered to file their reply to the Show Cause Notice, even after a period of almost fifteen months from the date of the Show Cause Notice.** As such, I have no other alternative but to proceed with the adjudication, on the basis of the material on record, since the proceedings cannot be withheld indefinitely as per the whims and fancies of the said noticee.

Discussion & Findings:

19.1 I have carefully gone through the records of the case, including the Show Cause Notice dated 29.03.2013.

19.2 I find that the following main issues are involved in the subject Show Cause Notice, which is required to be decided:-

1. The correct classification of the product under the schedule to the Customs Tariff Act, 1975, in respect of the Coal imported by the said noticee, as detailed in Annexure-A to the Show Cause Notice.
2. Whether 10000 MTs. of the imported Coal, valued at Rs. 7,83,03,416/-, as detailed in Annexure-A to the Show Cause Notice, imported by the said noticee, though not available physically, is liable for confiscation under the provisions of Sections 111 (d) and 111(m) of the Customs Act, 1962.
3. Whether the differential Customs Duty amounting to Rs. 83,07,210/-, as detailed in Annexure-A, demanded vide the Show Cause Notice is required to be determined under Section 28 (8) of the Customs Act, 1962 and the said amount is to be recovered from the said noticee.
4. Whether the said noticee is liable to pay interest involved on the said differential Customs Duty at the applicable rate under the provisions of Section 28AA of the Customs Act, 1962.

5. Whether the said noticee is liable for penal action, under Section 112(a) of the Customs Act, 1962.

20. After having framed the main issues to be decided, now I proceed to deal with each of the issues individually, herein below:

(1) The correct classification of the product, Coal imported by the said noticee, as detailed in Annexure-A to the Show Cause Notice, under the schedule to the Customs Tariff Act, 1975.

21.1 In this case, it is an undisputed fact that the coal under consideration is imported and that duty is leviable on such imported coal vis-à-vis grant of exemption, if any. For this purpose, one of the important steps in assessing the duty payable is the classification of goods under the Schedule to the Customs Tariff Act. Thus, the crux of the issue in this case, around which all the above five issues are revolved, which I am required to decide, is regarding the classification of the Coal imported by the said noticee, **within the ambit of the Schedule to the Customs Tariff Act, 1975**, for the purpose of levying of duty/deciding the eligibility for exemption.

21.2 In view of the above, the main issue before me for decision is whether the 'Coal' imported by the said noticee, falls under the category of 'Steam Coal' as declared by the said noticee, or is 'Bituminous Coal', as alleged in the Show Cause Notice, within the ambit of the Schedule to the Customs Act, 1975, in order to decide the eligibility of exemption or otherwise under Sl.No.123 of Notification No. 012/2012-Cus. dated 17.03.2012.

21.3 Now coming to the above said aspect in respect of the imported Coal under consideration, I am of the view that before proceeding for classification of an entity, it is absolutely essential to determine, 'what is the entity under classification dispute?' After such determination, a suitable heading or sub-heading in the tariff is to be located and then the same has to be considered, in light of Statutory Rules for Interpretation, the Section Notes and the Chapter Notes in the Tariff, to establish the proposed heading for classifying the entity would be appropriate or not. Thus, the goods are required to be classified taking into consideration the scope of headings/subheadings,

related Section Notes, Chapter Notes and the General Interpretative Rules.

21.4 I find that the whole issue of whether the goods imported by the said noticee, is entitled for exemption from duty in terms of Sl.No.123 of Notification No. 012/2012-Cus. dated 17.03.2012, has cropped up in the light of the Sub-heading Note 2 of Chapter 27 of the Schedule to Customs Tariff Act, 1975. Therefore, the issue is to be examined and considered in the light of the said Sub-heading Note 2 of Chapter 27, which reads as "For the purposes of sub-heading 2701 12, "bituminous coal" means *coal having a volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg.*"

21.5 I find that the Show Cause Notice has been issued proposing the classification of the imported Coal under CTH 2701 1200 as 'Bituminous Coal', only in respect of those imports, where the volatile matter limit (on a dry, mineral-matter-free basis) exceeds 14% and calorific value limit (on a moist, mineral-matter-free basis) is equal to or greater than 5,833 kcal/kg. Further, the Show Cause Notice does cover those bills of entry where the calorific value limit and the GCV is less than the above prescribed limit, which means that the same has been accepted as 'Steam Coal' falling under CTH 27011990. The above fact has not been disputed by the said noticee. **Thus, I am proceeding to decide the case on the said facts and on the premises that the Coal imported by the said noticee is having volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg. and as a consequence whether the said Coal is eligible for exemption under Sl.No.123 of Notification No. 012/2012-Cus. dated 17.03.2012.**

21.6 For proper appreciation, the classification and duty structure of Coal as per the First Schedule of the Customs Tariff, is as under:

Tariff Item	Description of goods	Rate of Duty				Remarks
		Standard		Effective		
		BCD	CV	BC	CVD	

			D	D		
2701	Coal; Briquettes, Ovoids and similar solid fuels manufactured from Coal - Coal whether or not pulverized, but not agglomerated:					Effective rate of Basic Customs Duty (BCD) as per Notfn. No.12/2012 -Cus. dt. 17.03.2012.
2701 11 00	- - Anthracite	10%	6%	5%	6%	
2701 12 00	- - Bituminous Coal	55%	6%	5%	6%	
270119	-- Other Coal:					
2701 19 10	- - - Coking Coal	10%	6%	0%	6%	
2701 19 20	- - - Steam Coal	10%	6%	0%	1%	
2701 19 90	- - - Others	10%	6%	5%	6%	

From the above Notification No.012/2012-Cus. dated 17.03.2012, it can be seen that the effective rate of duty for Bituminous Coal is 5% BCD + 6% CVD, as against Nil BCD + 1% CVD for Steam Coal.

21.7 As regards the definition of the above listed Coal under various headings/sub-headings are concerned, only two types of Coals have been defined under Chapter 27. These two definitions pertain to "Anthracite" and "Bituminous Coal", which are as under:

1. For the purposes of sub-heading 2701 11 "anthracite" means *coal having a volatile matter limit (on a dry, mineral-matter-free basis) not exceeding 14%.*
2. For the purposes of sub-heading 2701 12, "bituminous coal" means *coal having a volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg.*

21.8 From a reading of the above definition, it evolves that all Coal with a volatile matter limit (on a dry, mineral-matter-free basis) not exceeding 14% are to be classified as 'Anthracite', irrespective of the calorific value. However, the coal with a volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% will be classified as 'Bituminous Coal' if the calorific value limit (on a moist, mineral-matter-free basis) is equal to or greater than 5,833 kcal/kg and in other case,

where the caloric value limit is less than 5,833 kcal/kg, the same would be classified as 'Other Coal'. 'Other Coal' amongst others includes 'Steam Coal'. As such, the issue under consideration whether imported coal is Steam Coal or Bituminous Coal, is to be decided in the light of the above Chapter Notes and the General Interpretative Rules. Also, it is to be seen whether the headings/sub-headings of the imported coal can be arrived at by applying Rule 1 of the General Interpretative Rules or whether the other Rules from 2 to 6 *ibid* are to be applied sequentially.

21.9 The expression "Bituminous Coal" is defined under Sub Heading Note 2 of the Chapter 27 of the Customs Tariff Act, 1975. As per the Sub Heading Note 2 of the Chapter 27 of the Customs Tariff Act, 1975, "bituminous coal" means coal having a volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg. From the above, it is quite evident that the coal which possesses volatile matter value (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg is to be treated as "Bituminous Coal". On the other hand, it is worth mentioning that there is no specific definition of Steam coal, falling under Chapter Sub Heading No. 27011920.

21.10 The meaning of the terms "dry, mineral-matter-free basis" and "moist, mineral-matter-free basis" has been detailed in the Show Cause Notice. Accordingly, I gone through the literature 'Coal Production and Preparation Report (Instructions) - U.S. Department of Energy, Energy Information, Administration' available on website https://www.eia.gov/cneaf_Coal/page/surveys/eia7ainst.pdf, referred to in the Show Cause Notice. In the said report, it is stated that '*dry, mineral-matter free basis*' means that the total moisture and mineral matter have been removed from the Coal sample and '*moist, mineral-matter free basis*' means as though the natural inherent moisture is present but mineral matter has been removed from the Coal sample and moist Coal does not include visible water on the surface. Wherever the data in respect of Volatile Matter (VM) and Gross Calorific Value (GCV) is expressed on 'As Received Basis'(ARB) or 'Air Dry Basis'(ADB) or 'Dry Basis', the same needs to be converted into percentage value of Volatile Matter on 'dry, mineral-matter-free' basis and the Calorific Value on

'moist, mineral-matter-free basis'. For this, the literature available on the website of 'U.S. Department of Energy, Energy Information, Administration' which gives the formula (as detailed above), using which the Fixed Carbon (%) and Volatile Matter (%) both on dry, mineral-matter-free basis and Gross Calorific Value (Kcal/Kg) on moist, mineral-matter-free basis can be derived. The said formula is already detailed in the Show Cause Notice has hence not repeated. In this case, amongst others reliance is also placed on the above report of U.S. Department of Energy, Energy Information, and Administration.

21.11 I further find that the Joint Director, Customs Laboratory, Jawaharlal Nehru Customs House, Nhava Sheva, Raigad vide letter F.No.JNCH/T.O./2012-13 dt.07.03.2013 confirmed the applicability of the above mentioned formulae available on the website of 'U.S. Department of Energy, Energy Information, Administration' in calculating volatile matter limit of Coal (on a dry, mineral-matter-free basis) and a calorific value limit of Coal (on a moist, mineral-matter-free basis) to coal imported into India. He also confirmed that the values of Ash content, Sulphur content etc. are to be applied on Air Dry Basis (ADB).

22.1 As per the General Rules for the interpretation of the Import Tariff, it can be seen that classification shall be determined according to the terms of Headings and any relative Sections or Chapter Notes and provided such heading or Notes do not otherwise require, then by applying the Interpretative Notes 2, 3, 4, 5 and 6. In this case, 'Bituminous Coal' coal has been defined under Sub-heading Note 2 of Chapter 27 of CTA, 1975. In conformity with the Note, the Volatile Matter, calculated on dry, mineral-matter-free basis, for all the imported shipments is in excess of 14%. (whether ADB/ARB) and calorific value for all these consignments on moist, mineral-matter-free basis, is in excess of 5,833 Kcal/Kg. in respect of the Coal imported and covered by the Show Cause Notice. The Coal imported in these shipments confirms to the definition of 'Bituminous Coal' given in Sub-heading Note 2 of Chapter 27.

22.2 In terms of Rule 1 of the General Interpretative Rules, the titles of Sections, Chapters and Sub-chapters are provided for ease of reference only; **for legal purposes, classification shall be determined according to the terms of the headings and any**

relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require. Thus, this is the first Rule to be considered in classifying any product. For practical purposes, we may break this rule down into 2 parts:

- 1) The words in the Section and Chapter titles are to be used as guidelines ONLY to point the way to the area of the Tariff in which the product to be classified is likely to be found. Articles may be included in or excluded from a Section or Chapter even though the titles might lead one to believe otherwise.
- 2) Classification is determined by the words (terms) in the Headings (the first four numbers) and the Section and Chapter Notes that apply to them unless the terms of the heading and the notes say otherwise. **In other words, if the goods to be classified are covered by the words in a heading and the Section and Chapter Notes do not exclude classification in that heading, the heading applies.**

22.3 In the light of the above, for the imported coal under consideration, I have to find a Heading/Sub-heading that is worded in such a way so as to include the product in question, by referring to the Section and Chapter Notes, to see if the product is mentioned specifically, as being included or excluded. As already discussed, in this case Sub-Heading Note No.2 of Chapter 27 defines the parameters to be satisfied for classification as 'Bituminous Coal'. In conformity with the Note the Volatile Matter, calculated on dry, mineral-matter-free basis, for all the shipments covered by the Show Cause Notice, is in excess of 14%. (whether ADB/ARB) and calorific value for all these consignments on moist, mineral-matter-free basis, is in excess of 5,833 Kcal/Kg. In view of this, the Coal imported in these shipments confirms to the definition of 'Bituminous Coal' given in Sub-heading Note 2 of Chapter 27.

22.4 As regards the classification of imported Coal under Chapter Sub-heading 27011920, as Steam Coal, is concerned, it is clear that the same is grouped under the Heading 'Other Coal' falling after the Anthracite and Bituminous Coal. Therefore, this heading covers only those Coals which are other than and do not fall within the above stated definition of Anthracite and Bituminous Coal. In respect of the imported Coal covered by the Show Cause Notice, the same satisfies the

parameters for Chapter Sub-heading 27011200 and clearly answer to the description of 'Bituminous Coal' as per the definite definition assigned to the said Coal by Sub-heading Note 2 of Chapter 27. Thus, when the concerned goods fall under the definition of Chapter Sub-heading 27011200, the question or even the need for referring to the entry of the same goods in Chapter Sub-heading 27011920 does not arise. Such a need would have arisen if there was a doubt about the classification of goods under Chapter Sub-heading 27011200. In this case since the classification of the product can be arrived at an appropriate Tariff Heading/Sub-heading, by applying Rule 1 of the General Interpretative Rules itself, I find no reason for referring to the other interpretative Rules i.e. from 2 to 6 *ibid*.

22.5 The Hon'ble Supreme Court in the case of *Owal Agro Mills Ltd.* reported in 1993 (66) ELT-37 (SC) has held that where the words of the statute are plain and clear, there is no room for applying any of the principles of interpretation which are merely presumption in cases of ambiguity in the statute. The relevant paragraph 7 of the said judgement is reproduced below, which speaks for itself and is squarely applicable in this case:

7. "Where the words of the statute are plain and clear, there is no room for applying any of the principles of interpretation which are merely presumption in cases of ambiguity in the statute. The court would interpret them as they stand. The object and purpose has to be gathered from such words themselves. Words should not be regarded as being surplus nor be rendered otiose. Strictly speaking there is no place in such cases for interpretation or construction except where the words of statute admit of two meanings. The safer and more correct course to deal with a question of construction of statute is to take the words themselves and arrive, if possible, at their meaning, without, in the first place, reference to cases or theories of construction."

22.6 The Customs Tariff Act is broadly based on the system of classification from the International Convention called the Brussels' Convention on the Harmonised Commodity Description and Coding System (Harmonised System of Nomenclature). HSN is a safe guide for the purpose of deciding issues of classification. In the present case, the HSN explanatory notes to Chapter 27 categorically state that "bituminous coal" means coal having a volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833

kcal/kg. The Hon'ble Supreme Court in the case of Phil Corporation Ltd. Vs. CCE, Goa reported in 2008 (223) E.L.T. 9 (S.C.) has held that HSN is a safe guide for deciding issue of classification. The relevant paragraph 13 of the said judgement is reproduced below.

"13. The learned Additional Solicitor General also placed reliance on the judgment of this court in Collector of Central Excise, Shillong v. Wood Craft Products Ltd. - (1995) 3 S.C.C. 454. This court in paragraph 12 of the said judgment observed as under :-

"Accordingly, for resolving any dispute relating to tariff classification, a safe guide is the internationally accepted nomenclature emerging from the HSN. This being the expressly acknowledged basis of the structure of the Central Excise Tariff in the Act and the tariff classification made therein, in case of any doubt the HSN is a safe guide for ascertaining the true meaning of any expression used in the Act."

22.7 **In this case, a particular definition has been assigned to the word 'Bituminous Coal' in the statute. The very definitions set forth and define the key term used in the statute. These definitions are important because they suggest the legislative intend for a term to have a specific meaning that might differ in important ways from its common usage. The definitions so given in the Chapter Notes/Section notes of the Tariff are to avoid ambiguity and to explicitly define the terms used in that statute.** In this case, when the imported Coal is having a volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg., in terms of the definition given in the Sub-heading note, which is part of the statute, the coal so imported can be called as 'Bituminous Coal' only and not by any other name. As a consequence, the appropriate Chapter Sub-heading of this 'Bituminous Coal' will be 27011200 only.

23.1 As for the relevance of the Chapter Notes, for deciding the classification of the product, and subsequently its eligibility or otherwise for any exemption by way of notifications, I find that classification is to be determined only on the basis of description of the heading, read with relevant section or chapter notes. Since, these chapter notes are part of the Act itself; they have full statutory legal backing. It is a settled legal position that the Section Notes and Chapter Notes have an overriding force over the respective headings and sub-headings. This finds support in the decision of the Hon'ble Tribunal in the cases of Saurashtra

Chemicals Vs CC – 1986 (23) ELT 283 (CEGAT); Tractors and Farm Ltd. Vs CC – 1986 (25) ELT 235 (CEGAT); Tracks Parts Corpn. Vs CCE - 1992 (57) ELT 98 (CEGAT) and Calcutta Steel Industries Vs CCE - 1991 (54) ELT 90 (CEGAT).

23.2 In the case of Fenner India Ltd. Vs CCE – 1995 (97) ELT 8 (SC), the Hon'ble Supreme Court has observed that tariff schedule would be determined on terms of headings and or any relevant section or chapter notes. In Sanghvi Swiss Refills Pvt. Ltd. case reported in 1997 (94) ELT 644 (CEGAT), it was held that section notes and chapter notes, being statutory in nature, have precedence over functional test and commercial parlance for purposes of classification. **From the above judgements/decision it flows that, in this case, the product imported being Bituminous Coal, in terms of Sub-heading Note 2 of Chapter 27, the said imported Coal will not be eligible for exemption under Sl.No.123 of Notification No.012/2012-CE, dated 17.03.2012.**

24.1 It is not the case in the Show Cause Notice, that whether the product imported is Coal or not and for what purpose the same is imported. The issue is whether the Coal imported is 'Steam Coal or 'Bituminous Coal', for the determining the eligibility of exemption or otherwise, in terms of Sl.No.123 of Notification No.012/2012-CE, dated 17.03.2012. In this regard, I find that, as already discussed, as per the Sub-Heading Note 2 to Chapter 27, the Coal having Volatile Matter, calculated on dry, mineral-matter-free basis, for all the imported shipments is in excess of 14%. (whether ADB/ARB) and calorific value for all these consignments on moist, mineral-matter-free basis, is in excess of 5,833 Kcal/Kg. is defined as 'Bituminous Coal'. Further, there is no dispute regarding the fact that the Show Cause Notice has been issued proposing the classification of the imported Coal under CTH 2701 1200 as 'Bituminous Coal', only in respect of those Bills of entry, where the volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5,833 kcal/kg in respect of the imported coal. **Thus, in this case, where the words of the statute i.e. Sub-heading Notes are plain and clear, there is no room or scope for applying any other interpretation than the one given in the statute.**

24.2 **In view of the Sub-heading Note 2 of Chapter 27 of the Schedule to Customs Tariff Act, 1975; by applying Rule 1 of the General Interpretative Rules and by relying on the legal position in such cases settled by the Apex Court, it is quite evident that the Coal imported by the said noticee, is none other than 'Bituminous Coal' falling under Chapter Sub-heading 27011200 of the Schedule to Customs Tariff Act, 1975 and in no way can be considered as "Steam Coal" falling under Chapter Sub-heading 27011990 ibid. As such, the exemption under Sl.No.123 of Notification No.012/2012-CE, dated 17.03.2012, as claimed by the said noticee will not be available to the imported Coal covered by the Show Cause Notice.**

25. It is pertinent to mention here that a similar view has been taken by me, in respect of all the cases, where the show cause notices have been issued to various importers in identical issue, wherein the issue of classification of Coal is involved.

2 Whether 10000 MTs, imported Coal valued at Rs.7,83,03,416/- as detailed in Annexure-A to the Show Cause Notice, imported by the said noticee, though not available physically, is liable for confiscation under the provisions of Sections 111 (d) and 111(m) of the Customs Act, 1962.

26.1 In this case, as already discussed and decided by me, the coal imported by the said noticee, as detailed in Annexure-A to the Show Cause Notice, is Bituminous Coal, classifiable under Chapter Sub-heading 27011200 of the Schedule to Customs Tariff Act, 1975. However, for the purpose of claiming exemption, the said noticee has declared the same as Steam Coal and classified it under Chapter Sub-heading 27011920 ibid. The said noticee has declared the imported goods as Steam Coal, in spite of the fact that they were fully aware that the coal imported by them falls within the parameters prescribed in respect of Bituminous Coal in the light of Sub-heading Note 2 to Chapter 27. Since the noticee had wrongly claimed and availed the benefit of exemption under Sr. No. 123 of Notification No.12/2012-Cus dt.17.03.2012 which in turn led to less payment of differential BCD as well as CVD of Rs.83,07,210/- on the 'Bituminous Coal' by considering the same as 'Steam Coal', they have violated the provisions of Section 46 (4) of the Customs Act, 1962. Accordingly, the said imported goods are liable for confiscation, under Section 111(m) of the Customs Act,

1962. This contravention and or violation falls within the purview of the nature of offence prescribed under Section 111(m) of the Customs Act, 1962. Thus, the goods are liable for confiscation under Section 111(m) of the Customs Act, 1962.

26.2 I also find that the noticee has also contravened the provisions of Section 11 of the Foreign Trade (Development and Regulation) Act, 1992 (as detailed in the Show Cause Notice) and for this, the goods are liable for confiscation under Section 111(d) of the Customs Act, 1962. I also find no substance in the contention of the noticee that there is no mis-declaration of the imported Coal, on their part, since classification of Bituminous Coal in the name of Steam Coal, clearly falls under the category of mis-declaration.

26.3 **Therefore, I hold that the 10000 MTs. of Coal imported by the said noticee with wrong classification and with inappropriate description, totally valued at Rs.7,83,03,416/- as detailed in Annexure-A to the Show Cause Notice, are liable for confiscation under Section 111(m) and Section 111(d) of the Customs Act, 1962. However, since the concerned bill of entry has been assessed finally on account of RMS facilitation at the relevant time and the impugned goods are not available for confiscation, as the same have already been cleared, I refrain from imposing redemption fine in lieu of confiscation.**

3. Whether the differential Customs Duty payable by the said noticee as demanded vide the Show Cause Notice, should be determined as Rs.83,07,210/- under Section 28 (8) of the Customs Act, 1962 and whether the amount so determined, is to be recovered from the said noticee.

27.1 As discussed above, I have already held that the Coal imported by the said noticee as detailed in Annexure-A to the Show Cause Notice is Bituminous Coal, and as a consequence the said noticee is not eligible for the benefit of exemption Sr. No. 123 of Notification No.12/2012-Cus dt.17.03.2012, which is applicable for steam coal. Accordingly, they are required to pay duty for Bituminous Coal as per Sr. No. 124 of Notification No.12/2012-Cus dt.17.03.2012. Thus, the noticee is required to pay the differential duty of Rs.83,07,210/-, as detailed in Annexure-A to the Show Cause Notice, demanded vide the Show Cause Notice.

27.2 In view of the above, **I determine the differential duty payable by the said noticee as Rs.83,07,210/- (Rupees Eighty Three Lakhs Seven Thousand Two Hundred Ten Only) under Section 28(8) of the Customs Act, 1962, and the same is required to be recovered from them.**

4. Whether the said noticee is liable to pay interest involved on the said differential Customs Duty amounting to Rs.83,07,210/- at the applicable rate under the provisions of Section 28AA of the Customs Act, 1962.

28. As per the wordings of Section 28AA of the Customs Act, 1962 it is clear that when the said noticee is liable to pay duty in accordance with the provisions of Section 28 ibid, he in addition to such duty is liable to pay interest as well. The said Section provides for payment of interest automatically along with the duty. I have already held that differential Customs Duty of Rs.83,07,210/-, is required to be recovered from them. In view of this, **I hold that the said noticee is liable to pay interest involved on the amount of Rs.83,07,210/-, under the provisions of Section 28AA of the Customs Act, 1962.**

3. Whether the said noticee is liable for penal action, under Section 112(a) of the Customs Act, 1962:

29. As regards, imposition of penalty on the noticee under Section 112(a) of the Customs Act, 1962, since it has been held that the impugned 'Coal' as detailed in Annexure-A to the Show Cause Notice are liable for confiscation under Section 111(m) and 111(d) ibid of the Customs Act, 1962, **I, hold that the penalty under Section 112 (a) ibid is attracted on the importer. However, since the issue involved in this case being of technical nature regarding classification and availment of benefit of a notification, I take a lenient view while imposing the penalty.**

Non-filing of reply and not attending the Personal Hearing by six noticees:

30. I would like to place on record, regarding the conduct of the noticee in the adjudication proceedings. The said noticee, as discussed above, was asked to file their written submissions from time to time. **However, they have not bothered to file their reply to the**

Show Cause Notice, even after a period of almost fifteen months from the date of the Show Cause Notice.

31. Further, the non-cooperation on the part of these co-noticees is also evident from the fact that three opportunities of Personal Hearing were granted to the said noticee, on 21.02.2014, 29.04.2014, and 21.05.2014. In spite of the same, the noticee did not bother to attend the Personal Hearing. Thus I find that, they were not interested in the adjudication proceedings, and have made mockery of the principles of natural justice. In fact, they did not even bother to make any correspondence in response to the letters sent to them. They were successfully derailing the adjudication process, by their tacit non-cooperation and would like to use the cloak of denial of natural justice at appellate stage, to cover up their willful defaults. **A noticee, who repeatedly fails to avail the opportunity of Personal Hearings, forfeits all his claim of natural justice.**

32.1 **It is now a well settled position of law that where the noticees did not file the reply to the Show Cause Notice, and failed to avail the repeated opportunity of Personal Hearings, it has to be concluded that there is no opposition to the Show Cause Notice and the averments contained therein would be taken to have been admitted and that the said allegations contained in the Show Cause Notice have been agreed in toto.**

32.2 In this connection, I would like to reproduce the relevant para of the decision of the Hon'ble Tribunal in the case of Devang R. Vora Vs. Commissioner of Customs, Bombay reported in 2004 (176) E.L.T. 801 (Tri. - Mumbai)

8. The gist of allegations against the appellant in the show cause notice was that he had deliberately caused unauthorised importation of the subject goods thereby rendering the goods liable to confiscation under Section 111(d) of the Customs Act. The appellant has no case that he did not receive the notice. Admittedly, he never replied to the notice. The above allegation against him will, therefore, be held to have been conceded. This context reminds us of the Tribunal's larger Bench decision in CC v. R.K. International [2003 (159)E.L.T. 961] wherein it was held that, where show cause notice was not replied to, adverse inference could be drawn against the noticee at appellate stage even though the adjudicating authority did not deal with the aspect specifically. The law on the point was settled by the Hon'ble Supreme Court long back vide Rowjee v. State of A.P. [AIR 1964 SC 962].

The Apex Court held that, where the respondent in a writ petition did not file counter affidavit, there was no opposition to the petition and the averments contained therein would be taken to have been admitted. Virtually this ruling was followed by the Hon'ble High Court in the appellant's petition and, after noting that there was no counter-affidavit on behalf of the Revenue to controvert the allegations of the writ petitioner, it was held that there was substance in the petitioner's Counsel's complaint that the Tribunal had omitted to consider its earlier orders dated 24-1-2000 and 1-6-2000 which had allegedly been brought to the notice of the Tribunal. Following the Hon'ble Supreme Court and High Court, we hold that the allegations in the show cause notice, against the present appellant, are sustainable in toto."

32.3 In this case also, the above said noticee was granted enough opportunities for filing reply to the Show Cause Notice as well as to avail opportunity of Personal Hearing, but they did not avail the same. As such, I have no option but to follow the ratio of the judgement of the Hon'ble Supreme Court and the decisions of the Hon'ble Tribunal, which was rendered in an identical facts and circumstances. **Accordingly, I hold that the allegations in the Show Cause Notice, against the said noticee are sustainable *in toto*.**

33. In view of the forgoing discussions and findings, I pass the following order:-

:ORDER:

- (a) The Coal imported under the Bills of Entries covered in Annexure A to the Show Cause Notice dated 25.03.2013, **is considered and held as "Bituminous Coal" and is correctly classifiable under Tariff heading/sub-heading 2701 1200 of the Schedule to the Customs Tariff Act, 1975.** Accordingly the declared classification **under Customs Tariff item/heading 2701 1920, is hereby rejected.** Consequently, **I deny M/s. Swastik Coal Corporation Pvt. Ltd., J.J. Motal, Near Meera Guest House, Moti Khawdi, Khanwaliya Highway, Sikka, District: Jamnagar-361140, the benefit of exemption under Sr. No. 123 of the Notification No. 12/2012-Customs dated 17.03.2012.**
- (b) **The 10000 MTs. of the imported Coal, valued at Rs.7,83,03,416/-** as detailed in Annexure -A to the Show Cause Notice, imported by M/s. Swastik Coal Corporation Pvt. Ltd., J.J. Motal, Near Meera Guest House, Moti Khawdi, Khanwaliya

Highway, Sikka, District: Jamnagar-361140, **are held liable for confiscation under the provisions of Section 111(d) and 111(m) of the Customs Act,1962.** However, since the impugned goods are not available for confiscation, **I refrain from imposing any redemption fine in lieu of confiscation.**

- (c) I determine the differential Customs duty payable by M/s. Swastik Coal Corporation Pvt. Ltd., J.J. Motal, Near Meera Guest House, Moti Khawdi, Khanwaliya Highway, Sikka, District: Jamnagar-361140, as **Rs.83,07,210/- (Rupees Eighty Three Lakhs Seven Thousand Two Hundred Ten Only)** under Section 28(8) of the Customs Act, 1962, and order for recovery of the duty, so determined, from them.
- (d) I order for **recovery of interest involved on the differential duty of Rs.83,07,210/-** from M/s. Swastik Coal Corporation Pvt. Ltd., J.J. Motal, Near Meera Guest House, Moti Khawdi, Khanwaliya Highway, Sikka, District: Jamnagar-361140, under Section 28AA of the Customs Act, 1962.
- (e) I impose a **penalty of Rs.10,00,000/- (Rupees Ten Lakhs Only)** on M/s. Swastik Coal Corporation Pvt. Ltd., J.J. Motal, Near Meera Guest House, Moti Khawdi, Khanwaliya Highway, Sikka, District: Jamnagar-361140, under Section 112(a) of the Customs Act, 1962.

(K.L. GOYAL)
COMMISSIONER

F. No. S/10-97/Adjn./2013-14

Dated:05.06.2014

BY REGISTERED A.D. POST

To,
M/s. Swastik Coal Corporation Pvt. Ltd.,
J.J. Motal, Near Meera Guest House,
Moti Khawdi, Khanwaliya Highway,
Sikka, District: Jamnagar-361140.

Copy to:

- 1) The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad, with copy of Show Cause Notice dated 29.03.2014.
- 2) The Additional Director General, Directorate of Revenue Intelligence, AZU, Ahmedabad for information pl.
- 3) The Deputy/Assistant Commissioner(GR-I), Customs House, Kandla,
- 4) The Assistant Commissioner (Recovery Section, Custom House Kandla,
- 5) Guard file.